LIBRARY
SUPREME COURT U. S.

FILED
AUG 28 1969
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 523

TRI VALLEY GROWERS, formerly known as Tri-Valley Packing Association (a corporation),

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

RICARDO J. HECHT,
Alcoa Building,
One Maritime Plaza,
San Francisco, California 94111,
Attorney for Petitioner.

FRANCIS KERNER,
660 Market Street,
San Francisco, California 94104,
Of Counsel.

PERRAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinions below	2
Jurisdiction	3
Questions presented	3
Statutes involved	5
Statement	6
Reasons for granting the writ	18
Conclusion	25

Table of Authorities Cited

Cases

	Page
Abelleira v. District Court of Appeal, 17 C 2d 280 (1941), 109 P 2d 942	22
Briggs v. Pennsylvania Railroad Co., 334 U.S. 304	19
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134	19, 21
Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U.S. 266	19
Federal Trade Commission v. Henry Broch Company, 368 U.S. 360	23
Korber Hats, Inc. v. Federal Trade Commission, 311 F.2d 358 (1 Cir. 1962)	24
Morand Bros. Beverage Co. v. National Labor Relations Board, 204 F.2d 529 (7 Cir. 1953), cert. den. 346 U.S. 909	19
The Matter of Tri-Valley Packing Association, 60 F.T.C. 1134 (1962)	2
Tri-Valley Packing Association, 329 F.2d 694 (9 Cir. 1964)	3

Pages

United States v. Utah Construction & Mining Co., 384 U.S. 394 22

Zdanok v. Glidden Co., 327 F.2d 944 (2 Cir. 1964), cert. den. 377 U.S. 934) 20

Statutes

Administrative Procedure Act, 5 U.S.C. 500, et seq.:
5 U.S.C. 558(a) and (b) 6, 22
5 U.S.C. 706 6
Clayton Act:
Section 2 (15 U.S.C. 13) 5
Section 2(a) (15 U.S.C. 13(a)) 3, 5, 6, 7, 12
Section 2(b) (15 U.S.C. 13 (b)) 4, 9, 10, 16, 18, 20
Section 2(d) (15 U.S.C. 13(d)) 6, 7
Section 11 (15 U.S.C. 21) 2
Section 11(c) (15 U.S.C. 31(c)) 2, 5, 20, 21

28 U.S.C. 1254(1) 3

Texts

Austern, Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act, 81 Harvard Law Review, 773 (1968) 17

Dilks, A Stepchild Gains Small Favor: The FTC and the Meeting of Competition Defense Under The Robinson-Patman Act, The Business Lawyer 481,484 (Jan. 1966) 13

Small Business Problems in Food Distribution. H. Rep. No. 2234, 86 Cong. 2d Sess. 7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No.

TRI VALLEY GROWERS, formerly known as Tri-Valley Packing Association (a corporation),
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

TRI VALLEY GROWERS, a non-profit cooperative corporation, hereinafter called "Petitioner", respectfully prays that a writ of certiorari issue to

review a judgment of the United States Court of Appeals for the Ninth Circuit entered on May 29, 1969. The said judgment affirmed, as modified by the Court of Appeals, a *second* cease and desist order of Federal Trade Commission, issued on July 28, 1966 (R. XXIV, 2145-2147).[1] The case was brought to the United States Court of Appeals for the Ninth Circuit under the provisions of section 11(c) of the Clayton Act (15 U.S.C. 21(c)).

OPINIONS BELOW

This case has been before the Commission and the Court of Appeals on two occasions, and hence the Commission has issued two cease and desist orders therein.

The proceedings had in connection with the issuance of the first order, including the majority and dissenting opinions, are reported in *The Matter of Tri-Valley Packing Association,* 60 F.T.C. 1134 (1962). The findings, order, and opinion of the majority as well as the dissenting opinion of Commissioner Elman are set forth in Appendix "A".

The first decision of the Commission was on review reversed by the Court of Appeals and the case was

[1] "R" refers to the reproduced Transcript of Record. The Roman numerals preceding the comma refer to the volume of the reproduced record in which the reference appears. The Arabic numerals following the comma refer to the pages of the reproduced record in which the reference appears. The Arabic numerals are imprinted in *red ink* at the bottom of each page of the reproduced record.

thereupon remanded by the Court to the Commission for the resolution of certain issues as directed in the Court's opinion embodying its mandate. *Tri-Valley Packing Association*, 329 F.2d 694 (9 Cir. 1964). The opinion of the Court of Appeals is set forth in Appendix "B".

The second opinion of the Commission rationalizing the issuance of its second order, as yet not officially reported, is to be found in 1965-1967 CCH Trade Reg. Rptr. ¶ 17,657, page 22,934. The second dissenting opinion of Commissioner Elman is also reported in the same publication, beginning at page 22,942. These opinions are set forth in Appendix "C".

The second opinion of the Court of Appeals, as yet not reported, may be found in 1969 CCH Trade Case, ¶ 72,796. This opinion is set forth in Appendix "D".

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1969 (Appen. "E", pp. 118-119). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 21(c).

QUESTIONS PRESENTED

In a proceeding involving price discriminations *prima facie* violative of section 2(a) of the Robinson-Patman Act the Petitioner interposed the "meeting of competition" defense of the proviso appended to

section 2(b) of the Act and introduced evidence in support thereof. The Commission on May 10, 1962 by its findings as to the facts found, in effect, that Petitioner had met competitors' prices, but nevertheless disallowed the defense (Appen. "A", pp. 7-8). On review before the Court of Appeals the parties did not question the substantiality of the evidence supporting the finding that Petitioner had met competitors' prices, *and the Court did not disturb it.* For the reasons given in its opinion, the Court of Appeals remanded the cause to the Commission to resolve other issues (Appen. "B", pp. 54-55). The mandate of the Court of Appeals did not authorize the taking of additional evidence on the issue whether Petitioner had met competitors' prices, and the Commission did not ask for leave to do so as required by 15 U.S.C. 21(c). On remand the Commission relitigated the issue as to whether Petitioner had met competitors' prices and adduced additional evidence in connection therewith. After having done this, and on July 28, 1966, the Commission found that Petitioner had not met competitors' prices and, accordingly, issued a sweeping cease-and-desist order against Petitioner (Appen. "C", pp. 85-89; 67). On further review and on May 13, 1969, the Court of Appeals affirmed the Commission's order through a cryptic per curiam decision (Appen. "D", pp. 114-116).

In the setting above outlined, the following questions are presented:

1. Whether the Commission, acting in excess of the authority granted it by the mandate of the Court

of Appeals, should be permitted to relitigate a pivotal issue of fact which it had conclusively decided, four years before in Petitioner's favor by virtue of its finding as to the facts.

2. Whether the Commission acts in excess of jurisdiction when it adduces additional evidence in relitigating a relevant issue and does not secure leave of the Court of Appeals so to do as required by the review provisions of 15 U.S.C. 21(c).

3. Whether the Court of Appeals in affirming the order of the Commision, notwithstanding the Commission in making it had acted in excess of the authority granted by said Court's mandate and failed to observe the statutory requirements ordained by Congress to adduce additional evidence, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

4. Whether the breadth and scope of the Commission's Order exceeds the legitimate needs of the case and is therefore erroneous.

STATUTES INVOLVED

(1) Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13, especially subsections (a) and (b).

(2) Section 11 of the Clayton Act, 15 U.S.C. 21, especially subsection (c).

(3) The Administrative Procedure Act, 5 U.S.C. 500, et seq.; 5 U.S.C. 558(a) and (b) and 5 U.S.C. 706.

Pertinent portions are set out in Appendix "F".

STATEMENT

Petitioner is a farmer-owned and operated, non-profit cooperative corporation engaged in processing, canning and selling the California fruits and vegetables grown by its members (R. I, 2; R. VI, 573, 588; R. VIII, 628-630).

The Commission, with one of its members dissenting,[2] after extensive hearings and many years of litigation, has on two occasions decided that Petitioner violated sections 2(a) and (d) of the Robinson-Patman Act (15 U.S.C. 13(a) and (d)), and has issued successively two cease and desist orders enjoining Petitioner in the broadest terms from discriminating in prices and allowances between its competing buyers of its canned goods of like grade and quality (Appen. "A", pp. 9-10; Appen. "C", p. 67). This petition does not concern itself with the section 2(d) charges, except for the scope and breadth of the order. The first of these two decisions was on review reversed by the Court of Appeals and the case was remanded to the Commission for the resolution of certain issues

[2]Commissioner Elman (Appen. "A", pp. 24-28; Appen. "C", pp. 97-113).

as directed in the Court's opinion embodying its *mandate*[3] (Appen. "B", p. 64).

The section 2(a) charges brought against Petitioner, and Petitioner's "meeting of competition" defense, as well as the issues remanded by the Court in connection therewith center about the selling practices and prices prevalent in "California Street", a well known and long established food products market whose geographic hub is lower California Street in San Francisco. The first opinion of the Court of Appeals contains a brief description of this market which is based entirely on the uncontradicted testimony of Petitioner's assistant sales manager.[4] This description is as follows:

> "The canners and processors who participate in the California Street market sell most of their products in that market. As of 1957, the prices paid for goods in this market tended to be lower than the prices paid for the same or similar goods by purchasers who were not represented in it.

---

[3]The parties did not ask for leave to adduce additional evidence (15 U.S.C. 21(c)), but the Court by its mandate did grant, sua sponte, the Commission *restricted* leave to produce additional evidence in connection with 2(d) charges (Appen. "B", pp. 63-64).

[4]The operations of this market were the subject of an investigation by Subcommittee No. 5 of the Select Committee on Small Business of the House of Representatives. The conclusions drawn from the oral and documentary evidence adduced during the course of the investigation are embodied in a report entitled "Small Business Problems in Food Distribution". H. Rep. No. 2234, 86 Cong. 2 Sess. Part of this report is quoted in the second dissenting opinion of Commissioner Elman (Appen. "C", pp. 97-98). Mr. Everette MacIntyre, a member of the Commission since September 6, 1961 was the general counsel of the Subcommittee (Hearings before Subcommittee No. 5, Part II, Vol. 1, p. 523 (1960)).

At the beginning of the pack year, the canners and processors who sell on the California Street market determine from their records the amount of goods sold to various buyers in previous years. The sellers then attempt to obtain 'reservations' from the buyers for a given amount of merchandise to be delivered during the buying season, preferably in excess of that previously purchased.

After the reservations have been entered into, the canners announce their 'opening prices.' These opening prices are usually announced by the large or important factors in the industry comprised of the three or four nationally-advertised brand packers, or independent packers, of a particular commodity. When these price leaders have named their opening prices, the other canners, after examining their costs, will usually follow and name prices which are substantially similar to those of the leaders.

After the opening prices have been announced, they are analyzed by the buyers, *who then set the market price at the level of the lowest prices offered by reliable canners, and proceed to place their orders.* A canner whose prices are in line with the established prices will receive a fair share of shipping instructions. If he does not, or if he receives instructions only for limited quantities, the canner checks with the brokers, buyers or with other canners to determine the reason." (Appen. "B", pp. 51-52, footnote omitted).[5]

With this description in mind we now turn to the issue remanded by the Court in connection with Petitioner's "meeting of competition" defense.

---

[5]All emphasis added to quoted material is supplied by us, unless otherwise indicated.

To determine whether in resolving it, the Commission went beyond the power vested in it by the Court's mandate, we will first examine the opinion of the Court and the record to ascertain the specific nature of the issue remanded and how it originated.[6] The substance of this issue may be stated as follows:

Whether the competition which Petitioner faced in the California Street market is the kind of competition contemplated by the "meeting of competition" defense of section 2(b) (Appen. "B", p. 55).

This issue results from the fact that during the first round of litigation Commission counsel resorted to alternate theories in attempting to defeat Petitioner's "meeting of competition" defense.

Petitioner in presenting this defense to the Commission and the Examiner relied on the *undisputed* testimony of its assistant sales manager which established that its lower discriminatory prices were made to meet the market prices that large buyers were paying for goods on the California Street market, and contended that this evidence brought its discriminations within the proviso (R. V, 426-433; 454-456). This testimony was *not* corroborated by diaries or other records memorializing the prices charged or offered by each competing seller. This testimony did show, however, that Petitioner sought and obtained price and market information from its competitors

[6]In connection with price discrimination case the Court also remanded for resolution the issue whether there was causal connection between Petitioner's lower prices and probable competitive injury (Appen. "B", pp. 49-50), but this petition does not deal with it.

and customers and that it did this seven days each week and on a twenty-four hour basis (R. XVI, 1396-1398). At the close of Petitioner's case Commission counsel was given ample opportunity to adduce rebuttal evidence but did not do so (R. XVIII, 1558).

Commission counsel did not assail the substantiality of Petitioner's evidence, and *relied* thereon to make the following arguments to the Examiner:

(a) The *evidence* discloses that Petitioner is *meeting lower prices* on California Street pursuant to a discriminatory and illegal two market *pricing system,* and not in response to the lower prices of other sellers in individual competitive situations. Hence, Petitioner is not meeting competition within the meaning of the proviso (R. V, 485-487).

(b) The *evidence* shows that Petitioner knew or hould have known that the competitors' prices it *met* were *unlawful* in that they could not be *cost justified,* and the exemption afforded by the proviso can be claimed only when the *lower prices met* are *lawful.* Therefore, Petitioner is not meeting competition within the meaning of the proviso (R. V, 487).

By his first initial decision the Examiner decided the case against Petitioner. Therein the Examiner found that "The price differentials as hereinabove found, were not made to *meet* the *lawful* prices of a competitor in the sense of Section 2(b) of the amended Clayton Act" (R. IV, 363), and added the following comment thereto in his discussion as to the findings:

"With regard to one phase of respondent's discriminatory practices, *testimony of the witness Snyder indicated that there were two "market prices"* in Respondent's business; one price represented by the "market price" to all large chain buyers having representatives on California Street in San Francisco and another "market price" which applied to all other buyers not represented on California Street. The latter market price was the "list price" demonstrated by respondent's exhibits. These respondent's exhibits show that while a "list price" for a particular commodity extended to the non-favored purchasers, the favored purchasers were buying at the "market price" of California Street which was consistently and systematically lower than the list price. This "two-market system" within the same trade area does no comply with the requirement of "meeting a *lawful* price of a competitor in good faith" since it potentially may be injurious to competition and is therefore inherently illegal" (R. IV, 375).

There is nothing in this initial decision indicating that the Examiner felt that Petitioner's evidence was unreliable because it was not corroborated by documents.

On the first appeal the Commission rejected Petitioner's defense on the basis of the second of the two propositions postulated by its counsel to the Examiner, and did not deal with question involved in the first. Expanding on the scope of the proposition it thus adopted, it ruled and conclusively found as follows:

"9. Respondent claims that its lower prices to certain purchasers were made in good faith to meet the equally low prices of competitors. The competitors whose prices Respondent claims to have met are those packers who maintain sales representatives in San Francisco and sell through such representatives to certain large purchasers, including favored chain stores, who maintain buying agents in that city. The market in which such sales are made is known as the San Francisco or "California Street" market. The buyers represented in this market, including said large chain stores, have usually paid less for the packers' products than buyers that purchase in other markets. Although the opening prices in the "California Street" market are ordinarily announced by the packers, the goods are not sold in appreciable volume unless the prices are satisfactory to the buyers.

Respondent has admitted that almost invariably the "market price" in this market is established below the range of opening prices. Although Respondent was aware of all these facts and therefore knew, or should have known, that the lower prices of its competitors were discriminatory, it did not adduce evidence to show that it had reason to believe that such prices could have been cost justified or otherwise excused under Section 2(a). *Since Respondent has failed to prove that it had reason to believe that the prices of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices*" (Appen. "A", pp. 7-8).

It is apparent that to reach this result, the Commission had *first* to have found that the evidence *was*

sufficient to establish that Petitioner was engaged on California Street in *meeting* the lower prices of competitors, *whether or not the competition that engendered these prices was competition within the meaning of the proviso.* Moreover, there is nothing in the Commission's findings and opinion showing that it felt that Petitioner's evidence was valueless because it was too general and uncorroborated.

On the first petition for review Commission counsel not only defended the decisional ground adopted by the Commission, but also urged the Court to reject Petitioner's defense on the alternate ground that Petitioner had reduced its prices pursuant to an illegal and discriminatory two market pricing system[7] (Commission's Brief on Review, pp. 6-9; 40-46; 46-59; Appen. "B", pp. 53-54). Considering the alternatives so tendered the Court determined that it was not required to pass on questions concerning Petitioner's duty to produce evidence as to the lawfulness of competitors' prices, if, as contended by Commission counsel Petitioner had reduced its prices pursuant to an illegal pricing system. Considering also that the Commission had not expressly determined whether this market and its operations constituted such a system, the Court directed that the Commission should deal first with this threshold question on the law and the facts, and therefore remanded the cause to the Com-

[7]This argument may have been raised again on review because it was felt that the Commission might have gone too far in demanding that Petitioner demonstrate the lawfulness of the prices it was meeting. Dilks, A Stepchild Gains Small Favor: The FTC and the Meeting of Competition Defense Under The Robinson-Patman Act, The Business Lawyer 481,484 (January 1966).

mission (Appen. "B", p. 54). In the language of the Court the threshold issue is *"whether the competition which Tri Valley faced in the California Street market* is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)" (Appen. "B", p. 55).

Nothing in the opinion of the Court gives the slightest support to the idea that it felt that the evidence in the record was inadequate to enable the Commission to resolve the question thus entrusted to it, or that it was remanding the cause for the purpose of having the Commission redetermine whether Petitioner was meeting competition in the California Street market.

It should also be observed that there is nothing in the opinion of the Court that indicates that Commission counsel assailed Petitioner's evidence because it was not sufficiently specific and was not corroborated by documentary evidence. In fact the opinion of the Court discloses that Commission counsel relied on Petitioner's evidence in making their points (Appen. "B", pp. 53-54).

After remand, and on November 23, 1964, a prehearing conference was held before the examiner (R. XIX, 1575). At this hearing the examiner declared that in his view Petitioner's evidence was insufficient to establish that it had met competition and ruled that Petitioner had the burden of adducing additional evidence to remedy this flaw, *but did not at this time inform Petitioner of the reasons that rendered its proof inadequate* (R. XIX, 1581). The record indicates that the examiner was of two minds regarding

the sufficiency of the evidence proffered by Petitioner at the hearings held prior to remand. He declared first, as mentioned above, that Petitioner's evidence was inadequate, but then he went on to say that at the hearings to be thereafter held, he would be willing to receive evidence from Commission counsel by way of rebuttal[8] (R. XIX, 1581-1583).

Later, and on February 3, 1965—the *last* day of the post remand hearings—Petitioner was informed for the *first* time of the nature of the infirmities of its proof. As to this examiner said, in essence, that Petitioner's evidence was *too* general and not corroborated by documentation (R. XXVIII, 2610-2613). After the examiner had so expressed himself, he, and Commission counsel proceeded to elicit testimony from Petitioner's assistant sales manager that showed that he could not remember the name of each competitor whose prices had been met and which also established that Petitioner did not have and had not maintained any records showing the prices charged by each of its individual competitors (R. XXVIII, 2165-2629).[9] Petitioner did not thereafter request leave to adduce additional evidence—it believed that the issue involved had been previously decided by the Commission (R. XXVIII, 2611-2613).

Subsequent to the post remand hearings and in April, 1965, the examiner filed his second initial decision. In it he predictably found that Petitioner "did not grant the discriminatory price concessions to the

[8]See Supra, p. 10.

[9]The testimony thus elicited is incorporated in the Examiner's second initial decision (R. XXII, 1895).

favored retail chains to meet in good faith the equally low price of a competitor" (R. XXII, 1894), and again decided the cause against Petitioner (R. XXII, 1916-1917). On the second appeal to the Commission Petitioner argued in effect that the rejection by the examiner in 1965 of testimony which he had fully credited in 1961 was arbitrary (R. XXIV, 2084-2085).

Nevertheless, the Commission adopted the examiner's finding as its own (Appen. "C", p. 65) and in so doing fashioned the following inflexible rule regarding a 2(b) defense:

> "General testimony to the effect that price discriminations were made to 'meet competition' *without* documentation or specific evidence, *is never* sufficient to support a finding that a lower price was 'made in good faith to meet an equally low price of a competitor'" (Appen. "C", p. 88.)[10]

Applying this principle the Commission rejected the testimony of Petitioner's witness, and by this device relitigated a fact question which it had theretofore decidded in Petitioner's favor. While doing this the Commission also concluded that Petitioner had not "used reasonable diligence in verifying the existence of a lower price of a competitor" (Appen. "C", pp. 88-89), thus ignoring that the question of "reasonable diligence" was not even suggested to the Court of Appeals on the first review. The Commission

[10]Obviously, the application in all cases of this fixed rule of thumb deprives the Commission of *discretion* in the estimation of the worth and weight of evidence.

did pay lip service to the Court's mandate in that it decided that a seller could reduce its prices to meet those of its competitors in the California Street market even though the latter were using a formal pricing system.[11] Thus Petitioner was absolved of the charge that it had participated in an illegal two price market, but by this contrivance the Commission was enabled to issue a cease and desist order against Petitioner without having to deal with the California Street market as a whole.

The dissenting opinion of Commissioner Elman clearly shows that the Commission by its action incurred a direct estoppel and also acted in excess of the authority granted by the Court's mandate. As to this he wrote:

> "It seems to me that such an objection to the adequacy of Respondent's evidence comes rather late and with poor grace. * * * In essence the Commission is telling Respondent *after all these years* that there is insufficient proof of the basic factual premise upon which both sides, the hearing examiner, the Commission, and the Court of Appeals proceeded in dealing with the legal issues arising out of the 2(b) defense. This case was finally decided by the Commission on that factual basis in 1962, and the remand to the Commission from the Court of Appeals *was not for the purpose of reexamining the sufficiency of the proof in that regard.* The Court of Appeals remanded the case to the Commission, so far as the 2(b) defense was concerned, *for the sole and*

[11] Austern, Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act, 81 Harvard Law Review, 773, 812-813 (1968).

> *limited purpose of having it pass on the question —not whether Tri-Valley was meeting competition in the California Street market*—but "whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b) (329 F.2d at 706). That question the Commission now decides in Respondent's favor" (Appen. "C", pp. 108-109).

On the second petition for review before the Court of Appeals Petitioner argued that the Commission had not resolved the 2(b) issue in accordance with its mandate, and while disregarding the mandate relitigated an issue which had been originally decided in Petitioner's favor. Petitioner also argued on this review that the Commission was without power to receive or consider additional evidence on remand. The Court summarily disposed of these arguments saying that they did "not have sufficient merit to warrant reversal" and affirmed the Commission's order (Appen. "D", pp. 116-117).

Petitioner did not ask for a rehearing.

REASONS FOR GRANTING THE WRIT

(a) When the case first came before the Commission it decided that Petitioner's discriminations were not sheltered by the proviso to section 2(b) because it had failed to prove that the prices of its competitors were lawful. This was a legal issue which did

not involve an administrative determination or the enforcement of legislative policy (*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145), and when the Commission acted thereon it adjudicated. When on review the parties came before the Court of Appeals it was to obtain its decision on this legal question. However, the Court decided that it was not required to pass on this question until the Commission first adjudicated the threshold legal issue whether the competition which Petitioner faced was of the kind contemplated by the proviso and remanded the cause to the Commission for this limited purpose. But, as has been shown, the Commission departed from the ambit of the mandate and adjudicated other legal issues. It has been consistently held that an inferior court has no power or authority to deviate from the mandate issued by an Appellate Court (*Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306), and this rule can be applied with equal force to agencies when the circumstances are similar to those exhibited by the record herein (*Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 277-278; *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532 (7 Cir. 1953), cert. den. 346 U.S. 909). Accordingly, when the Court of Appeals on second review affirmed the Commission it was not merely ignoring harmless error, but it was instead sanctioning an excess of authority which enabled the Commission to impose an order which carries with it severe statutory penalties (15 U.S.C. 21(l)).

(b) The mandate of the Court did not authorized the Commission to adduce additional evidence to resolve the issue remanded, but the Commission nevertheless adduced such evidence. Without leave of Court the Commission could not lawfully consider further evidence on this issue, even though some of it was received without objection; the question is not one of procedure but goes to the power of the Commission to receive it without authority from the reviewing Court (*Zdanok v. Glidden Co.;* 327 F.2d 944, 949-950 (2 Cir. 1964), cert. den. 377 U.S. 934). Clearly the evidence so smuggled enabled the Commission to establish that Petitioner could not corroborate its proof by documentation, and this in turn enabled the Commission to reject Petitioner's general testimony *in toto,* thus leaving Petitioner's case a *blank* so far as evidence upon its 2(b) defense is concerned. This disaster could not have occurred except for this excess of jurisdiction, but nevertheless the Court of Appeals by its affirmance approved the illegal course taken by the Commission.

(c) Section 11(c) of the Clayton Act (15 U.S.C. 21(c); Appen. "F", pp. 122-123) requires, in effect, that when a party desires to adduce additional evidence it must apply to the reviewing court for leave to do so *before* it introduces it—*not after*. Here, the Commission introduced such evidence *before* making the required application. Moreover, the statute requires a showing that the evidence is material, and that there were reasonable grounds for failure to adduce it in the proceeding before the Commission but no such showing was made. This showing, of

course, enables the adverse party to know the nature of the evidence; to object to its materiality, and also to prepare its defense against it, if any. In short, the procedure therein ordained by Congress is in aid of due process. When it was pointed out to the Court that the Commission had considered evidence beyond that permitted by the mandate and had not applied for leave to adduce it, Commission counsel reacted audaciously. They said, "If * * *, the Court now determines that the Commission in its endeavor to discharge its functions *in the public interest* has received * * * any evidence beyond that permitted by the Court's mandate, it is requested that this Court treat the instant brief as the request and showing contemplated by section 11(c) of that statute * * *. No violation of Tri Valley's fundamental right to a fair hearing * * * would result from such procedure" (Commission's Supplemental Brief, p. 17, footnote 11). Obviously, the Commission does not discharge its functions in the public interest when it acts in clear defiance of a statute enacted expressly for its government and restraint by the legislative body that brought it into being and sustains it (*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146). The nature of the evidence that the Commission was able to receive and consider by bypassing the statute and the Court was not known until the last day of the post remand hearings, and hence, it cannot be candidly said that there was no violation of Petitioner's right to a fair hearing. Moreover, when a statute authorizes prescribed procedure and an adjudicative body acts contrary to

the authority so conferred, it exceeds its jurisdiction and this excess may be corrected on review (*Abelleira v. District Court of Appeal,* 17 C 2d 280, 288-289 (1941); 109 P 2d 942, 947-948). Nevertheless, the Court of Appeals failed to correct this excess of power.

As to this and other excesses of jurisdiction herein related it should be observed that a federal agency may not impose sanctions except within delegated jurisdiction and as authorized by law, and, further, that a reviewing court is required to set aside agency action which is in excess of such authority or is taken without observance of procedure required by law (Administrative Procedure Act (5 U.S.C. 558(a), (b); 706. Appen. "F", pp. 123-124).

(d) Originally, the Commission by its finding 9 found that Petitioner was meeting competition on California Street (Appen. "A", pp. 7-8). The finding was deemed to be supported by substantial evidence when made and was therefore left undisturbed on the first review. Accordingly, this relevant finding should be accorded finality as between the parties. Pertinent to this matter is this Court's opinion in *United States v. Utah Construction & Mining Co.,* 384 U.S. 394, wherein the following appears:

> "* * * When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it *which the parties have had an adequate opportunity to litigate,* the courts have not hesitated to apply res judicata *to enforce repose.* * * *" (384 U.S. 394)

It is apparent, therefore, that there was neither need nor justification for relitigation on this issue, and that for this reason the Court of Appeals was required to reverse the Commission for so doing.

(e) We now take up the breadth and scope of the order.

In *Federal Trade Commission v. Henry Broch Company,* 368 U.S. 360, this Court after alluding to the stringent penalties provided by the amendment to Section 11 of the Clayton Act (15 U.S.C. 21(l)), said that the possibility of the imposition of such penalties required that the Commission fashion cease and desist orders "which are, at the outset, sufficiently clear and precise to avoid raising questions as to their meaning and application" (368 U.S. 367-368).

The first paragraph of the order, in substance, restrains Petitioner from discriminating in price between purchasers of its goods of like grade and quality *who,* in fact, *compete* (Appen. "C", p. 67). This order is unprecedented, and includes within its ambit every conceivable competitive relationship. We submit this novel order, comprehending, as it does, the whole spectrum of competition, is far beyond the legitimate necessities of the case. There is no showing of prior violations of the Act by Petitioner, and, moreover, its discriminations resulted from an effort to meet competitors' prices in a highly competitive market. Also, the *competing* buyers involved were purchasing goods for *resale,* and not for use or con-

sumption. Therefore, this order requires correction (*Korber Hats, Inc. v. Federal Trade Commission*, 311 F.2d 358, 363-364 (1 Cir. 1962)).

That the part of the order enjoining violations of section 2(d) (Appen. "E", pp. 118-119) lacks justification is shown in the dissenting of opinion of Commissioner Elman. There he said:

> "The divergence between the goals of the Act and its practical applications is also illustrated by the Commission's holding that respondent violated Section 2(d). After eight years of litigation and two separate sets of hearings, two isolated instances of nonproportionalized promotional allowances, both involving paltry sums, are all the Commission can scrape together from the voluminous record. It is precious little justification for the board 'Do not violate the statute, or else' injunction which the Commission is issuing here. By impossing an order on Tri-Valley, a pygmy in the canning industry, on the theory that it has hurt Safeway, one of the giants of the food retailing industry, the Commission again turns the Robinson-Patman Act topsy-turvy. The Act was designed to curb abuses of the buying power of the big chains. Too often, however, it has been used to thwart the efforts of small businessmen to meet the competition of their larger and more powerful rivals. This case is another entry in that sad record." (Appen. "C", pp. 112-113, footnote omitted.)

CONCLUSION

For the reasons stated above it is respectfully submitted that the Court of Appeals has sanctioned a gross departure from the accepted and usual course of judicial proceedings, and therefore this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 26, 1969.

RICARDO J. HECHT,
Attorney for Petitioner.

FRANCIS KERNER,
Of Counsel.